Filed 12/11/03 P. v. Garza CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ROSENDO GARZA,

Defendant and Appellant.

F041445

(Super. Ct. No. 69863)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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Just before midnight on January 29, 2001, Diane Bailey drove to an AM/PM Mini Mart at the corner of Dinuba Boulevard and Sweet Street in North Visalia to buy some cigarettes. As she entered the store, Bailey passed by two men, later identified as Jose Rosendo Garza and Mark Sartuche, standing near the door. By the time she came out again, Garza and Sartuche had left and were walking east on Sweet Street. Bailey drove

out of the parking lot and was headed in the same direction when Garza motioned her to stop. She did, and Garza approached her car. At the same time, he produced a handgun and said something like "I want your money, bitch." Bailey tried to drive away, but immediately lost control of her car and crashed into a house across the street. Garza fired several shots at the car before he and Sartuche fled into a different house nearby. A police officer on patrol in the area came upon the scene about this time and shot twice at Garza before he managed to escape. Sartuche was arrested at the scene that night; Garza was arrested at a different location about three weeks later. Garza belongs to a criminal street gang known as the North Side Visalia (NSV) Locos, whose activities include assault, carjacking, and vandalism.

Based on these facts educed at his preliminary hearing on March 16, 2001, Garza was charged with three felony and two misdemeanor offenses, as follows:

> Count 1 charged Garza with attempted murder (Pen. Code, §§ 664, 187)[1] committed with deliberation and premeditation (§ 664, subd. (a)). It also alleged that Garza had intentionally discharged a firearm in the commission of the offense (§ 12022.53, subds. (c) and (e)(1)); that he had personally used a firearm in the commission of the offense (§ 12022.5, subds. (a) and (d)); and that he had committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).
>
> Count 2 charged Garza with assault with a deadly weapon (§ 245, subd. (b)), and included personal use (§ 12022.5, subd. (a)(1)) and gang enhancement (§ 186.22, subd. (b)(1)) allegations.
>
> Count 3 charged Garza with attempted robbery (§§ 664, 211) and included two personal use allegations (§§ 12022.53, subd. (b)) and 12022.5, subds. (a) and (d)), and a gang enhancement allegation (§ 186.22, subd. (b)(1)).
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> Count 4 charged Garza with resisting a peace officer (§ 148, subd. (a)(1)) on the night of the shooting incident.

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1 All further statutory citations refer to the Penal Code.

Count 5 charged Garza with resisting a peace officer (§ 148, subd. (a)(1)) on the day of his arrest.

Garza entered pleas of not guilty to all the charges, and denied the enhancement allegations. Numerous delays and continuances followed. Finally, over a year later on May 15, 2002, Garza agreed to enter pleas of no contest to counts 1, 3, 4, and 5, and to admit all the allegations in those counts except for the deliberation and premeditation allegation in count 1. In exchange, this allegation and count 2 would be dismissed, as would the charges pending against Garza in another case.

At the sentencing hearing on July 10, 2002, before the sentence was pronounced, Garza told the court through his attorney that he wished to withdraw his no-contest plea and go to trial. The court denied this request. The attorney -- who had been retained by Garza to replace the second of his two court-appointed attorneys -- then indicated Garza wanted to replace him too. The court denied this request as well.

The court then imposed the indicated 25-year sentence as follows: In count 1, the court sentenced Garza to the lower term of five years for attempted murder, and added a 20-year enhancement for the discharge of a firearm in the commission of the offense. In count 3, the court sentenced Garza to the lower term of three years and added a 20-year enhancement for the personal use of a firearm. The court ordered the sentence for count 3 to run concurrently with the sentence for count 1.[2]

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[2] Although the record fails to specify, it appears the court followed the probation officer's recommendations with respect to the remainder of its sentencing options. That is, it evidently did not impose the personal use and gang enhancements in counts 1 and 3 (see § 12022.53, subds. (e) and (f)), and it imposed concurrent one-year jail terms in counts 4 and 5.

The court, also in keeping with the probation officer's recommendation, indicated it was imposing the *upper* term of three years for the attempted robbery charged in count 2. Generally, the punishment for an attempted offense is one-half the term that could have been imposed for the same offense if completed. (§ 664, subd. (a).) The prescribed term for second degree robbery is two, three, or five years. (§ 213, subd. (a)(2).)

On appeal, Garza challenges the court's denial of his request to withdraw his plea (which he characterizes as a motion to continue the sentencing hearing), and his request to replace his retained attorney (which he characterizes as a *Marsden* motion (*People* v. *Marsden* (1970) 2 Cal.3d 118)). He also contends, and the People concede, that the gun use enhancement in count 3 should have been for 10 rather than 20 years. We will modify the sentence to reflect the correct 10-year enhancement in count 3, and we will affirm the judgment as so modified.

DISCUSSION

The following exchange, which underlies Garza's contention he was entitled to a continuance, occurred at the outset of the sentencing hearing:

> "MR. LEE [defense attorney]: Your Honor, before we proceed there is legal grounds where I think we shouldn't proceed with sentencing at this time, and I need to state that for the record.
>
> "THE COURT: Go ahead.
>
> "MR. LEE: Your Honor, Mr. Garcia wishes to withdraw the plea. I received a plea transcript last week and I was able to see him at the jail yesterday and review that matter with him. Mr. Garza doesn't feel like he fully understood the consequences and what he was actually doing by entering the plea. He does want to withdraw the plea and have a jury trial.
>
> "I have been advised this morning of something that I was unaware of and I actually was advised this morning that this information had been provided to previous counsel but was not provided to me when I received the file from previous counsel. I think there were two other attorneys prior to my representation of Mr. Garza. And I did not receive this information.
>
> "I am advised this morning that Joey was born at the weight of one pound. He was a special ed kid. He has some limited understandings, and it may well be, Your Honor, in light of that … I thought he was understanding the proceedings [but] given his learning disabilities, … he may well not have understood it.
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> "He tells me today that he wants to withdraw the plea. He doesn't feel like he was advised properly by me. And he would like an opportunity to withdraw the plea. And it may well be, Your Honor, he didn't

understand what was going on. I didn't realize he had the learning disability and I apologize to the Court.[3]

"THE COURT: Motion is denied. Let's move on. Do you have any comments about the sentence?

"MR. LEE: It's the minimum sentence the Court can impose according to the statute, so I have no further comment."

At this point, just as the court began to pronounce sentence, Garza made what he now claims was a *Marsden* motion.

"MR. LEE: Your Honor, Mr. Garza is asking me to advise the Court that he would like other counsel, that he doesn't feel like he has been properly advised by me in this matter. And he is requesting the appointment of other counsel.

"THE COURT: Denied."

I. Garza's Request to Withdraw His Plea

Garza maintains his request contained in the first part of the passage quoted above should be understood not as a motion to withdraw his no-contest plea but as a motion to continue the sentencing hearing to permit him to gather evidence in support of a motion to withdraw the plea. This evidence presumably would show that Garza has some sort of learning disability that prevented him from fully appreciating the significance of the plea. Alternatively, he appears to be basing his request not on any cognitive impairment of his own, but rather on his attorney's alleged failure to advise him adequately regarding the consequences of the plea.

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3 The public defender's office represented Garza at the preliminary hearing, but it was replaced at the felony arraignment by a private attorney who evidently was appointed as conflict counsel. That attorney was later relieved at a trial setting conference on July 27, 2001. Garza retained Mr. Lee sometime between then and the continued trial setting on August 10, 2001. Thus, Attorney Lee had represented Garza for some nine months prior to the change of plea hearing on May 15, 2002.

Moreover, in response to the People's argument that he failed to make a sufficient showing of good cause for withdrawing his plea (see § 1018), Garza remains steadfast in his insistence that we treat this as a motion for a continuance. "Appellant has not argued, and does not now contend, that the trial court abused its discretion in [not] permitting [him] to withdraw his pleas. Once again, appellant's claim is that the court abused its discretion in failing to grant a continuance …." We will proceed accordingly.

The threshold question then, before we can consider whether the court erred by denying a motion for a continuance, is whether it should have known this *was* a motion for a continuance. By our count, Attorney Lee appeared with Garza in these proceedings 13 times in the nine months leading up to the change-of-plea hearing. During that period, Lee made two formal, written motions for a continuance and several more informal ones. (See § 1050.) He knew how to request more time if that is what he wanted. Lee said four times at the sentencing hearing that Garza wished to withdraw his plea, but he never once said that Garza wanted more time to prepare a motion to withdraw his plea.

And Lee's comments at the sentencing hearing must be put into context. It seems that in the 11 months he had been representing Garza, nothing in Garza's statements or demeanor had suggested to Lee that Garza might be having trouble understanding what was going on. The same seems to be true of the judge, who presided at many of the prior proceedings, including the change-of-plea hearing. Simply asserting in this context that Garza might have a learning disability -- which does not necessarily equate to an inability to knowingly and intelligently waive his trial rights -- cannot reasonably be understood to be a request for a continuance to determine whether he should be allowed to withdraw his plea. We find no error.

2. Garza's Request to Replace His Attorney

Referring to the second part of the exchange quoted above, Garza characterizes his request to replace his retained attorney as a *Marsden* motion (to replace a court-appointed attorney) and faults the court for failing to inquire into the reasons for his dissatisfaction.

Garza concedes in his reply brief that *Marsden* does not apply, but he argues nonetheless that the court should have granted the motion.

Unlike situations where counsel has been appointed by the court, a defendant may discharge his retained counsel with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) The right to discharge retained counsel is not absolute, however, and the trial court retains the discretion to deny such a request if it is untimely, or if granting it would result in a "'disruption of the orderly processes of justice.'" (*Ibid*.) Put another way, the court need not grant the motion if it finds that the defendant has been "'unjustifiably dilatory or … arbitrarily desires to substitute counsel at the time of trial.' [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 153.)

The court in the present instance reasonably could have concluded that Garza's last minute request to replace his attorney was simply an attempt to delay the proceedings even further. Once the court had denied Garza's motion to withdraw his plea, there was nothing left to do but impose the sentence to which Garza had already agreed.

People v. Lara, *supra*, 86 Cal.App.4th 139 is readily distinguishable. There the defendant, on the day trial was to begin, expressed some dissatisfaction with his retained counsel. The trial court treated the matter as a *Marsden* motion and, following a hearing, ruled the defendant had failed to make a sufficient showing to justify the appointment of new counsel. On appeal, this court noted that the showing required to replace appointed counsel under *Marsden* is higher than that required to replace retained counsel. We consequently reversed on the ground that the trial court may have misunderstood the scope of its discretion. (*Id*. at p. 166.) We did not conclude, as Garza's citation to *Lara* would seem to suggest, that the lower court in that case erred by not granting the motion. Nor are the present circumstances similar to those in *Lara*. We find no error.

III. The Gun Use Enhancement in Count 3

Counts 1 and 3 both included section 12022.53 gun use enhancement allegations. However, the count 1 allegation was made pursuant to subdivision (c) of that section, and

the count 3 allegation was made pursuant to subdivision (b). The former subdivision provides for a 20-year enhancement when the defendant "intentionally and personally discharged a firearm" in the commission of the underlying felony. The latter subdivision applies when the defendant "personally used" a firearm in committing the offense, and provides for only a 10-year enhancement. Although Garza admitted the subdivision (b) allegation in count 3, the court, consistent with the probation officer's recommendation, imposed a 20-year subdivision (c) enhancement. Garza contends, and the People agree, that the judgment must be modified to reflect the correct count 3 enhancement. Since the court ordered the sentence for count 3 to run concurrently with that imposed for count 1, the modification will not alter the length of Garza's sentence.

DISPOSITION

The judgment is modified to reflect the imposition of a 10-year enhancement in count 3 pursuant to section 12022.53, subdivision (b), and as so modified, the judgment is affirmed. The trial court is instructed to prepare a new abstract of judgment accordingly and deliver it to the Department of Corrections.

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Buckley, Acting P.J.

WE CONCUR:

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Wiseman, J.

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Levy, J.